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22 UNITED STATES DISTRICT COURT

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24 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

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26 STATE OF CALIFORNIA, *et al.*,
27 Plaintiffs,
28 v.
29 WILBUR L. ROSS, JR., *et al.*,
30 Defendants.

31 Civil Action Nos. 3:18-cv-01865-RS

32 **DEFENDANTS' PROPOSED FINDINGS
33 OF FACT AND CONCLUSIONS OF
34 LAW**

35 Dept.: 3
36 Judge: The Honorable Richard G. Seeborg
37 Trial Date: January 7, 2019
38 Action Filed: March 26, 2018

39

40 CITY OF SAN JOSE, *et al.*,
41 Plaintiffs,
42 v.
43 WILBUR L. ROSS, JR., *et al.*,
44 Defendants.

45 Civil Action Nos. 3:18-cv-02279-RS

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Pursuant to the Court's Guidelines for Final Pretrial Conference in Bench Trials Before District Judge Richard Seeborg, the Defendants United States Department of Commerce, Wilbur L. Ross, Jr., in his official capacity as Secretary of Commerce, Bureau of the Census, and Ron S. Jarmin, in his capacity as performing the non-exclusive functions and duties of the Director of the U.S. Census Bureau, hereby submit the following proposed findings of fact and conclusions of law.

PROPOSED FINDINGS OF FACT

I. Background

1. The Undisputed Facts, attached as Exhibit A to the Joint Pretrial Statement and Proposed Order, ECF No. 119 in No. 18-1865 and ECF No. 125 in No. 18-2279, are hereby incorporated by reference.

II. Facts Relevant to Plaintiffs' Standing

A. Injury in Fact.

1. NRFU Can Mitigate A Potential Decline in Self-Response

2. The Census Bureau's comprehensive non-response follow-up ("NRFU") operation, which includes multiple mailings, in-person follow-up visits, the use of high-quality administrative records, and proxy responses from knowledgeable individuals, will mitigate a potential decline in self-response from inclusion of a citizenship question on the 2020 decennial census questionnaire, such that there will be a complete and accurate enumeration.

a. *Any potential decline in self-response is unknown*

3. While the balance of available evidence suggests that including a citizenship question on the 2020 census could lead to a lower self-response rate in households that potentially contain a noncitizen, the extent of any decline, though reliably estimated to be positive, is unknown.

4. A decline in self-response for a subpopulation is not necessarily associated with an increase in the net undercount of that population. A decline in self-response means that the non-

1 response follow-up workload may be increased, but the Census Bureau may capture all of the
 2 additional nonresponding households during NRFU.

3 5. Self-response rates have been steadily declining for decades. AR 162.

4 6. The Census Bureau projects an overall self-response rate in the range of 55.5% to
 5 65.5%, and while it uses the midpoint (60.5%) for certain purposes, it uses the low point (55.5%)
 6 for budgeting and other planning purposes. These projections are consistent with the decades-long
 7 decline in self-response rates. AR 172.

8 7. For the 2020 decennial census, households will be given the option to complete the
 9 questionnaire via the Internet or by telephone, in addition printed questionnaires. AR 165.

10 8. The presence of a citizenship question on the 2020 census will not affect whether
 11 addresses are included in the Master Address File.

12 9. Regardless how a household responds to the 2020 census, if the household simply
 13 skips the citizenship question, that household will nonetheless be enumerated in full. And if a
 14 household reaches the citizenship question and refuses to respond beyond that point, that
 15 household will nonetheless be enumerated in full. It is only if a household does not substantially
 16 complete the questionnaire that the household is included in the NRFU workload.

17 10. The U.S. Census Bureau issued a working paper in August 2018 that is the best
 18 analysis of the citizenship question's impact on the potential decline in self-response rates. *See*
 19 Brown, J. David, Misty L. Heggeness, Suzanne M. Dorinski, Lawrence Warren, and Moises Yi, U.S.
 20 Census Bureau, Center for Economic Studies, Understanding the Quality of Alternative Citizenship
 21 Data Sources for the 2020 Census, Working Paper, CES 18-38, Aug., 2018 ("Brown paper"). Using
 22 available data from the 2010 census, the 2010 and 2016 American Community Surveys, and
 23 administrative records, the paper estimates a potential 5.8 percentage point decline in self-response
 24 from households that contain a noncitizen. *Id.*

25 11. While 5.8 percentage points reflects the best available estimate of the potential
 26 decline in self-response rate, because it is an estimate it is unknowable to what extent such a decline
 27 will occur.

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1 12. The analysis of Plaintiffs' expert, Dr. Matthew Barreto, does not provide reliable
 2 evidence of a different or greater decline in self-response rates to the 2020 census. Dr. Barreto
 3 conducted a public opinion survey designed to look at response rates to the 2020 census in the face
 4 of a citizenship question, but fundamental flaws in the design of that survey and interpretation of
 5 its results render its results unreliable. For example, asking someone about their intention to do
 6 something, as Dr. Barreto did, and measuring what they actually do in a field experiment are very
 7 different.

8 ***b. Partnership and communication/outreach efforts will increase the self-
 9 response rate***

10 13. Outreach and communications efforts by the Census Bureau during the 2020
 11 census will have the effect not only of increasing the overall self-response rate, but also of reducing
 12 the net differential self-response rate. *See generally* 2020 Census Operational Plan (DTX-020).

13 14. The Census Bureau will utilize an integrated communications and partnership
 14 campaign to recruit national, regional, and local partners and develop effective messages stressing
 15 the confidentiality of census data, the statistical purposes for census data, and the statutory
 16 prohibition against sharing those data with any agency. *See generally* 2020 Census Operational Plan
 17 (DTX-020).

18 15. Partners will include both state and local governments and private organizations.
 19 While partners are welcomed to spend their own money to aid the Census Bureau's mission, the
 20 federal government compensates partners for any expenditures specifically requested by the Census
 21 Bureau. *See generally* 2020 Census Operational Plan (DTX-020).

22 ***c. NRFU efforts are comprehensive, well-funded, and flexible***

23 16. At the end of the self-response period, six weeks into the 2020 Census, households
 24 without a self-response become part of the NRFU workload.

25 17. Any decline in the self-response rate due to the citizenship question is currently
 26 expected to be within the budget, planning, and operational design of NRFU and other statistical
 27 methods used to mitigate any decrease in the initial self-response rate. If Congress appropriates
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1 funds in accordance with the Life Cycle Cost Estimate, the Census Bureau will have \$1.5 billion to
 2 conduct NRFU operations, along with another \$1.7 billion in contingency funding.

3 18. For every one percent increase or decrease in the overall self-response rate above or
 4 below the budget planning self-response rate of 55.5%, the Census Bureau assumes \$55 million will
 5 be saved or spent in NRFU operations. Even if the Brown paper has accurately predicted a 5.8%
 6 decline in self-response rate for potential noncitizen households—*i.e.*, approximately 28.6% of the
 7 population—this leads to only a 1.5% decline in the overall self-response rate, resulting in an extra
 8 \$82 million in NRFU expenditures. A higher, hypothetical 10% decline in the self-response rate
 9 among potential noncitizen households results in a 2.5% decline in overall self-response rate with
 10 an estimated \$137.5 million in NRFU costs. These estimates are far below the projected \$1.7
 11 billion in contingency funding, and this remains true even if one assumes six enumerator attempts
 12 per household and concomitantly doubles all estimated NRFU costs.

13 19. Enumerator recruiting targets are based on an overall self-response rate of 55.5%,
 14 so the Census Bureau will have plenty of enumerators ready to deploy in the event self-response
 15 rates decline. These enumerators are drawn from the communities in which they will be deployed,
 16 helping households feel comfortable in responding. While the current 2018 Appropriations Act
 17 prevents the Census Bureau from hiring noncitizen enumerators, the Census Bureau is seeking to
 18 reclassify certain enumerators as translators—an exception to this hiring restriction. The Census
 19 Bureau will hire non-U.S. citizens as permitted by federal law. Because it is premature to conclude
 20 that the Census Bureau will not be able to hire non-citizens as enumerators for the 2020 census, it
 21 is unknown how that fact might affect any net undercount.

22 20. Enumerators are also deployed in an efficient manner to best obtain census
 23 enumerations. Using a state-of-the-art optimizer, 2020 census enumerators will be assigned
 24 households to visit, provided the most efficient route to reach each household, and then given the
 25 optimal times to visit each household based on statistical models of the local area. The optimizer
 26 also will allow Area Census Office managers and staff to identify the most effective enumerators
 27 and adjust NRFU workloads accordingly.

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1 21. While many of the historical documents describing the number of NRFU attempts
2 use a hypothetical limit of six visits, in the 2020 Field Operational Control System the actual
3 measure is an “attempt day”—the number of days that NRFU enumerators attempt to obtain a
4 response from a household. During an attempt day, there can be multiple attempts. In addition,
5 near the end of NRFU operations, closeout procedures allow the number of attempt days to exceed
6 six. The binding constraint is the date that NRFU operations close, not a maximum number of
7 attempt days.

8 22. If an address in the NRFU workload receives one unsuccessful in-person visit, it
9 becomes eligible for enumeration by administrative records. Administrative records are electronic
10 records compiled by another unit of the federal government, including the Internal Revenue
11 Service, Health and Human Services, the Bureau of Indian Affairs, the Postal Service, and the
12 Social Security Administration.

13 23. If no high-quality administrative records exist for that household, the address stays
14 in the NRFU workload and gets the full NRFU consideration. The Census Bureau will not
15 conclude that a unit is vacant unless at least three separate administrative records indicate that the
16 unit is vacant.

17 24. The use of administrative records will not create or exacerbate a differential net
18 undercount. Administrative records simply supply a method of low-cost enumeration when high-
19 quality administrative records are available; if no such records exist, then the full NRFU protocol
20 will be used. The fact that hard-to-count groups are relatively underrepresented in administrative
21 records thus does not establish that the use of administrative records will result in those groups
22 ultimately being undercounted when all enumeration operations are completed.

23 25. If a household does not self-respond and cannot be enumerated using
24 administrative records, and the Census Bureau is unable to get a response through in-person visits,
25 enumerators may interview a proxy. A proxy could be a landlord, a neighbor, a postal carrier, or
26 another person with knowledge of the household. The proxy process is specifically designed to
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1 obtain a head count for the number of people residing at an address, and training techniques have
 2 been implemented to ensure that enumerators seek out a reliable proxy for that critical purpose.

3 26. The Census Bureau is unaware of any credible empirical evidence suggesting that
 4 proxies in the census provide a greater net undercount or differential net undercount in comparison
 5 to self-response or in-person interviews. There is no credible evidence that households enumerated
 6 via proxy responses are more likely to be undercounted than self-responding households because
 7 proxy respondents are likely to systematically underreport the number of people living in certain
 8 units.

9 27. The fact that proxy responses tend to generate less accurate demographic data also
 10 does not indicate that proxy responses tend to result in higher net undercounts. Inaccurate
 11 demographic data does not affect the actual enumeration.

12 28. Dr. Barreto's study does not remotely simulate the extensive recontact efforts
 13 undertaken during NRFU—Dr. Barreto did not actually recontact anyone at a later day or at a later
 14 time. He also does not take into account the use of administrative records or proxies, or
 15 imputation. His study therefore does not provide credible evidence as to the expected results after
 16 NRFU and imputation in 2020.

17 **2. Imputation Will Adequately Account for Any Remaining Households**

18 29. The use of imputation to enumerate the limited number of individuals not captured
 19 by self-response and NRFU operations will accomplish a complete and accurate enumeration.

20 30. No quantitative evidence shows that whole-person census imputations tend to
 21 systematically overcount or undercount the number of people in a household.

22 31. The Census Bureau uses imputation to enumerate housing units that remain
 23 unresolved after the self-response and NRFU operations (in-person interviews, administrative
 24 records, and proxy responses) are exhausted. *See generally* 2020 Census Operational Plan (DTX-
 25 020).

26 32. The Census Bureau has not yet determined the final imputation algorithms it will
 27 use in the 2020 census. In general, the Census Bureau uses statistical criteria to aggregate nearby
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1 housing units that have characteristics matching those of the missing unit in the Master Address
 2 File, taking into account the distribution of household sizes. The Census Bureau then randomly
 3 selects one of those nearby units and uses the number of people in that unit to fill in the number of
 4 people in the missing unit.

5 33. Based on assumptions built into the Life Cycle Cost Estimate, along with the rate of
 6 imputation from the 2010 Census, the Census Bureau projects that, without a citizenship question,
 7 0.38% of all households would be imputed. Using these same assumptions, along with the Brown
 8 paper's 5.8% estimate for the decline in self-response rate for potential noncitizen households, the
 9 Census Bureau projects imputation of 0.40% of all households in the 2020 census, assuming the
 10 average rate of resolution through the NRFU process. Even assuming that all households not self-
 11 responding due to a citizenship question would go through the full NRFU process without
 12 achieving the average rate for resolution, the result would be a projected imputation of 0.60% of all
 13 households.

14 34. In none of these scenarios would a household go uncounted simply because it did
 15 not self-respond due to a citizenship question. Even in the worst-case scenario, the result is simply
 16 more imputations.

17 35. Increased imputations by themselves do not lead to an increased differential net
 18 undercount. To produce a differential net undercount, properties of the imputation model must be
 19 credibly linked to non-response due to the presence of a citizenship question, which Plaintiffs have
 20 not done.

21 36. The fact that imputation tends to generate less accurate demographic data does not
 22 indicate that imputation tends to result in higher net undercounts. Inaccurate demographic data
 23 does not affect the actual enumeration.

24 **3. No Increase in the Differential Undercount Will Remain After NRFU
 25 Operations and Imputation**

26 37. Any undercount that remains after NRFU operations and imputation will not be
 27 “differential,” or will not undercount a particular racial or ethnic group to a greater or lesser extent
 28 than the overall net undercount or overcount of the population.

1 38. There have been net differential undercounts in past censuses, including when there
 2 was no citizenship question on the “short form” of the census questionnaire sent to every
 3 American. The logical inference is that the net differential undercounts in those censuses could not
 4 have been caused by the presence of a citizenship question.

5 39. Plaintiffs have adduced no evidence regarding how the citizenship question will
 6 impact the differential net undercount.

7 40. That the citizenship question may be “sensitive” for certain persons, or groups of
 8 persons, does not, without more, establish that the citizenship question is likely to exacerbate the
 9 net differential undercount for the 2020 Decennial Census.

10 **4. Specific Claims of Injury**

11 41. Any differential undercount that remains after NRFU operations and imputation
 12 will not be sufficiently large to cause any impact on apportionment or federal funding or produce
 13 any of the other specific injuries claimed by Plaintiffs.

14 ***a. Apportionment***

15 42. After the census is taken, congressional seats are distributed pursuant to “the
 16 method of equal proportions,” a complex process that ranks states in order of priority based on
 17 their populations (multiplied by a multiplier). *See* 2 U.S.C. § 2a(a).

18 43. Dr. Stuart Gurea, Defendants’ expert, calculated the effect on apportionment
 19 assuming a 5.8% decrease in self-response among households with at least one individual without
 20 confirmed citizenship (derived from the Brown paper), with a NRFU success rate in 2020 equal to
 21 the 2010 census NRFU success rate (and assuming no additional undercount mitigation through
 22 imputation). With these assumptions, congressional apportionment in any state (including
 23 California) does not change as a result of the inclusion of a citizenship question. Plaintiffs have
 24 provided no evidence of any adverse effect on their federal representational interests in any
 25 reasonable scenario that can be anticipated to occur as a result of the 2020 census.

26 ***b. Federal funding***

1 44. A differential net undercount would not have an impact on federal funding under
 2 the vast majority of federal funding programs.

3 45. Out of the approximately 2,249 government funding programs, only approximately
 4 320 use census-derived data to allocate funds.

5 46. All of the census-derived data sets that are used to determine funding amounts
 6 under certain federal funding programs use the final census data, not initial self-response rates.

7 47. Out of the approximately 320 federal government funding programs that use
 8 census-derived data to allocate funds, Plaintiffs' expert, Dr. Reamer, identified only twenty-four
 9 programs which used geographic allocation formulas that rely in whole or part on census-derived
 10 data, and he performed calculations for only three such programs.

11 48. Dr. Gurea calculated the effect on the three federal funding programs highlighted
 12 by Dr. Reamer, assuming a 5.8% decrease in self-response among households with at least one
 13 individual without confirmed citizenship (derived from the Brown paper), with a NRFU success
 14 rate in 2020 equal to the 2010 census NRFU success rate (and assuming no additional undercount
 15 mitigation through imputation). With these assumptions, the distribution of federal funds to the
 16 State of California is estimated to decline by 0.01%. The additional mitigation achieved through
 17 imputation would reduce this impact even further.

18 49. Because Dr. Reamer's calculations are based entirely upon undercount scenarios
 19 which fail to take into account the effect of full NRFU and imputation on response rates, they are
 20 inaccurate and unreliable and, as such, of limited evidentiary value.

21 50. Dr. Reamer's calculations are also of limited evidentiary value because they do not
 22 purport to predict what will happen in 2020. Instead, his calculations look backwards—to what
 23 would have happened in fiscal years 2015 and 2016 had there been an additional undercount due to
 24 the presence of a citizenship question on the 2010 decennial census.

25 51. The evidentiary value of Dr. Reamer's calculations is further diminished because his
 26 calculations rest upon the assumption that allocation formulas for the three programs in question
 27 will not change in the coming years and that funding amounts will remain substantially unchanged.

1 Congress could alter the funding amounts and allocation formulas, including the manner and extent
 2 to which they rely upon census-derived data between now and several years after 2020, which is the
 3 earliest possible year the 2020 census numbers would impact federal funding.

4 52. Plaintiffs have not adduced any quantitative evidence of the amount of federal
 5 funding any specific county, city, or municipal government would lose under any federal program if
 6 there were an increase in the differential undercount resulting from the inclusion of a citizenship
 7 question.

8 53. Plaintiff Black Alliance for Immigration Justice (“BAJI”) has not adduced any
 9 quantitative evidence of the amount of federal funding it or any of its members would lose under
 10 any federal program if there is an increase in the differential undercount resulting from the
 11 inclusion of a citizenship question.

12 *c. Other financial harm*

13 54. None of the governmental Plaintiffs have established that the Secretary’s decision
 14 has required them to divert existing resources or expend additional resources. Plaintiffs allege that
 15 they will need to divert or expend resources as a result of the inclusion of the citizenship question,
 16 but they have neither quantified the specific amount of the resources diverted or expended nor
 17 established that any specific amount of the alleged diverted or increased expenditures is attributable
 18 to or made necessary by the citizenship question. Further, because Plaintiffs have not adduced any
 19 evidence indicating that there will be a net undercount, any decision by Plaintiffs to spend or divert
 20 resources specifically because of the citizenship question is not based on a reasonable fear that the
 21 citizenship question will result in such a net undercount in their jurisdiction. Plaintiffs also have
 22 not shown that they have accounted for the Census Bureau’s non-response follow-up and
 23 imputation procedures in assessing the risk of any net undercount.

24 55. The nongovernmental Plaintiff, BAJI, likewise has not established that the
 25 Secretary’s decision has required it to divert existing resources or expend additional resources.
 26 Though BAJI alleges that it will need to divert or expend resources as a result of the inclusion of
 27 the citizenship question, it has neither quantified the specific amount of the resources diverted or
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1 expended nor established that any specific amount of the alleged diverted or increased expenditures
 2 is attributable to or made necessary by the citizenship question. Further, because Plaintiffs have
 3 not adduced any evidence indicating that there will be a net undercount, any decision by BAJI to
 4 spend or divert resources specifically because of the citizenship question is not based on a
 5 reasonable fear that the citizenship question will result in such a net undercount in their
 6 jurisdiction. BAJI also has not shown that it has accounted for the Census Bureau's non-response
 7 follow-up and imputation procedures in assessing the risk of any net undercount.

8 56. Plaintiffs have not established that their perceived need to increase or divert
 9 expenditures is caused by the citizenship question rather than by the general fear and distrust of
 10 government among immigrants and communities of color due to the macro-environment.

11 57. There is no direct conflict between BAJI's mission and the inclusion of a citizenship
 12 question on the census.

13 *d. Decrease in data quality*

14 58. Plaintiffs did not provide credible evidence that, should the inclusion of the
 15 citizenship question result in inaccurate demographic data, that result will be harmful to them.
 16 Their evidence was conclusory and lacked key specifics, including what services might be affected,
 17 how those services depend on demographic data about local populations, and the degree of
 18 inaccuracy necessary to affect those services.

19 *e. Loss of privacy*

20 59. The Census Bureau is barred from disclosing individual responses to a citizenship
 21 question on the decennial census questionnaire, and cannot disclose any information through which
 22 the data furnished by any particular establishment or individual can be identified.

23 60. The Census Bureau does not disclose citizenship information that has not gone
 24 through an approved disclosure avoidance process. The Census Bureau is in the process of
 25 developing the disclosure avoidance methodology that it will use for the data collected from the
 26 citizenship question on the 2020 decennial census.

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1 61. Plaintiffs' alleged confidentiality or privacy concerns about the possible disclosure
 2 of their citizenship information are based on speculation and not a reasonable assessment of an
 3 actual risk.

4 **B. Causation and Redressability**

5 62. Any undercount that occurs in 2020 cannot be shown to be specifically attributable
 6 to the citizenship question rather than to other, independent factors, such as the general macro-
 7 environment. Similarly, the harm alleged by Plaintiffs cannot be shown to be specifically
 8 attributable to the citizenship question rather than to other, independent factors, such as the
 9 general macro-environment.

10 63. The macro-environment, including the political environment, can affect response
 11 rates.

12 64. The macro-environment may make persons from some subgroups reluctant to
 13 respond to the census questionnaire regardless of whether it contains a citizenship question or not.
 14 Similarly, some households may be unlikely to provide a full enumeration whether or not there is a
 15 citizenship question on the census.

16 65. Getting accurate household rosters (and hence an accurate household count) has
 17 been a continuing issue for the Census Bureau whether or not a citizenship question appears on the
 18 census, and there is no quantitative evidence linking the incompleteness of household rosters to a
 19 citizenship question on the census.

20 66. There is no evidence that removal of the citizenship question from the census will
 21 redress Plaintiffs' claimed injuries.

22 **III. Administrative Record Facts**

23 The merits of Plaintiffs' Administrative Procedure Act ("APA") and Enumeration Clause
 24 claims must be decided on the basis of the administrative record, without consideration of extra-
 25 record evidence produced in discovery or at trial. Accordingly, set forth below are those facts from
 26 the administrative record on which this Court bases its legal review of the Secretary's decision.

27 **A. Secretary Ross's Examination of Census Issues**

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1 67. Soon after Wilbur L. Ross was appointed and confirmed as Secretary of Commerce,
 2 he “began considering various fundamental issues” regarding the 2020 census, “including funding
 3 and content,” as well as schedule, contracting issues, systems readiness, and the upcoming 2018
 4 End-to-End Test. AR 1321; *see also* AR 317-322, 1416-1470. The Secretary’s ultimate goal in
 5 reviewing these issues is “make every effort to provide a complete and accurate decennial census.”
 6 AR 1313.

7 68. One of the issues Secretary Ross examined early in his tenure “included whether to
 8 reinstate a citizenship question,” which he and his staff “thought . . . could be warranted.” AR
 9 1321. Secretary Ross questioned why a citizenship question was not on the census questionnaire
 10 and sought other general background “factual information.” AR 2521-2522, 12465, 12541-12543;
 11 *see also* AR 3699 (referring in a May 2017 email to his “months[’] old request that we include the
 12 citizenship question”).

13 69. Secretary Ross and his staff “had various discussions with other governmental
 14 officials about reinstating a citizenship question to the Census” and, “[a]s part of that deliberative
 15 process, [they] consulted with Federal governmental components.” AR 1321. In particular, they
 16 inquired “whether the Department of Justice (DOJ) would support, and if so would request,
 17 inclusion of a citizenship question as consistent with and useful for enforcement of the Voting
 18 Rights Act.” *Id.*

19 70. DOJ has requested a special tabulation of citizenship data derived from the
 20 American Community Survey (“ACS”) for the purposes of carrying out its enforcement
 21 responsibilities under the Voting Rights Act. AR 278-283, 9203-9216.

22 71. Department of Commerce Deputy Chief of Staff and Chief of Policy Earl
 23 Comstock initially reached out to DOJ in May 2017. AR 2462, 12755.

24 72. In August and September 2017, Secretary Ross requested an update on the status of
 25 the inquiries regarding the reinstatement of a citizenship question. AR 2034, 2424, 2459-2460,
 26 4004, 12476.

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1 73. Secretary Ross spoke with the Attorney General on September 18, 2017, about
 2 whether DOJ would find citizenship data from the decennial census useful. AR 2528, 2636.

3 **B. DOJ's Request to Reinstate a Citizenship Question on the 2020 Decennial
 4 Census to Facilitate Enforcement of the Voting Rights Act**

5 74. On December 12, 2017, Arthur E. Gary, General Counsel of DOJ's Justice
 6 Management Division, sent a letter to Dr. Ron Jarmin, performing the non-exclusive functions and
 7 duties of the Director of the Census Bureau. AR 663-65.

8 75. In that letter, Mr. Gary stated that “[t]he Department of Justice is committed to
 9 robust and evenhanded enforcement of the Nation's civil rights laws and to free and fair elections
 10 for all Americans. In furtherance of that commitment, I write on behalf of the Department to
 11 formally request that the Census Bureau reinstate on the 2020 Census questionnaire a question
 12 regarding citizenship, formerly included in the so-called 'long form' census. This data is critical to
 13 the Department's enforcement of Section 2 of the Voting Rights Act and its important protections
 14 against racial discrimination in voting. To fully enforce those requirements, the Department needs
 15 a reliable calculation of the citizen voting-age population in localities where voting rights violations
 16 are alleged or suspected. As demonstrated below, the decennial census questionnaire is the most
 17 appropriate vehicle for collecting that data, and reinstating a question on citizenship will best enable
 18 the Department to protect all American citizens' voting rights under Section 2.” AR 663.

19 76. Mr. Gary noted the importance of obtaining citizen voting-age population for
 20 determining whether a racial group could constitute a majority in a single-member district, and its
 21 utility for avoiding the “wrong result” of drawing a single-member district in which a minority
 22 group constituted a majority of the voting-age population but not the majority of the citizen voting-
 23 age population. AR 663-64.

24 77. Mr. Gary stated that “in order to assess and enforce compliance with Section 2's
 25 protection against discrimination in voting, the Department needs to be able to obtain citizen
 26 voting-age population data for census blocks, block groups, counties, towns, and other locations
 27 where potential Section 2 violations are alleged or suspected.” AR 664.

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1 78. Mr. Gary stated that the Census Bureau had included a citizenship question on the
 2 “long form” questionnaire from 1970 to 2000, and that DOJ had formerly used that data to assess
 3 compliance with Section 2 and in Section 2 enforcement litigation. AR 664.

4 79. Mr. Gary noted that DOJ had begun using citizenship data from the ACS after the
 5 Census Bureau discontinued the use of the “long form” questionnaire, but he explained that the
 6 ACS does not yield the ideal data for such purposes for four reasons. AR 664-65.

7 80. First, Mr. Gary explained that “[j]urisdictions conducting redistricting, and the
 8 Department in enforcing Section 2, already use the total population data from the census to
 9 determine compliance with the Constitution’s one-person, one-vote requirement, *see Evenwel v.*
 10 *Abbott*, 136 S. Ct. 1120 (Apr. 4, 2016). As a result, using the ACS citizenship estimates means
 11 relying on two different data sets, the scope and level of detail of which vary quite significantly.”
 12 AR 664.

13 81. Second, because the ACS estimates are rolling and aggregated into one-year, three-
 14 year, and five- year estimates, Mr. Gary stated that “they do not align in time with the decennial
 15 census data. Citizenship data from the decennial census, by contrast, would align in time with the
 16 total and voting-age population data from the census that jurisdictions already use in redistricting.”
 17 AR 665.

18 82. Third, Mr. Gary explained that “the ACS estimates are reported at a ninety percent
 19 confidence level, and the margin of error increases as the sample size—and, thus, the geographic
 20 area—decreases. *See* U.S. Census Bureau, Glossary: Confidence interval (American Community
 21 Survey), https://www.census.gov/glossary/#term_ConfidenceintervalAmericanCommunitySurvey
 22 (last visited Nov. 22, 2017). By contrast, decennial census data is a full count of the population.”
 23 AR 665.

24 83. Fourth, Mr. Gary noted that “[c]ensus data is reported to the census block level,
 25 while the smallest unit reported in the ACS estimates is the census block group. *See* American
 26 Community Survey Data 3, 5, 10. Accordingly, redistricting jurisdictions and the Department are
 27 required to perform further estimates and to interject further uncertainty in order to approximate
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1 citizen voting-age population at the level of a census block, which is the fundamental building block
 2 of a redistricting plan.” AR 665. Mr. Gary explained that “[h]aving all of the relevant population
 3 and citizenship data available in one data set at the census block level would greatly assist the
 4 redistricting process.” *Id.*

5 84. For all these reasons, DOJ stated that it “believes that decennial census
 6 questionnaire data regarding citizenship, if available, would be more appropriate for use in
 7 redistricting and in Section 2 litigation than the ACS citizenship estimates.” Accordingly, “the
 8 Department formally request[ed] that the Census Bureau reinstate into the 2020 Census a question
 9 regarding citizenship” and “that the Census Bureau release this new data regarding citizenship at
 10 the same time as it releases the other redistricting data, by April 1 following the 2020 Census.” AR
 11 677.

12 **C. The Department Of Commerce’s Analysis of DOJ’s Request**

13 85. Following receipt of DOJ’s request, the Secretary of Commerce “set out to take a
 14 hard look at the request and ensure that [he] considered all facts and data relevant to the question
 15 so that [he] could make an informed decision on how to respond.” AR 1313. To that end,
 16 Commerce “immediately initiated a comprehensive review process led by the Census Bureau.” *Id.*
 17 “The Census Bureau and the Department’s Office of the Secretary began a thorough assessment
 18 that included legal, program, and policy considerations.” *Id.* As part of this process, the Secretary
 19 “met with Census Bureau leadership on multiple occasions to discuss their process for reviewing
 20 the DOJ request, their data analysis, [his] questions about accuracy and response rates, and their
 21 recommendations.” *Id.*

22 86. The Census Bureau assembled a team to perform the technical analysis, led by Dr.
 23 John M. Abowd, Chief Scientist and Associate Director for Research and Methodology. AR 3354,
 24 5539-5542, 9339; *see also, e.g.*, AR 8990, 9005, 9244. That team conducted preliminary analyses
 25 during the period from December 2017 to January 2018. *See* AR 5495-5511; *see also* AR 3713-3720,
 26 5538, 5539-5542, 5553-5564, 5658-5677, 5656-5717, 6489-6495, 6533-6542, 7763-8261.

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1 87. On January 19, 2018, Dr. Abowd and his team, on behalf of the Census Bureau,
 2 submitted a detailed memorandum (hereinafter referred to as the “January 2018 Abowd Memo”) to
 3 Secretary Ross. AR 1277-85. This memorandum analyzed three alternatives to provide DOJ with
 4 the data it had requested—Option A (make no change), Option B (add the question on the 2020
 5 census questionnaire), and Option C (use administrative data to provide citizenship information).
 6 AR 1277.

7 88. The January 2018 Abowd Memo described certain advantages of Option B, adding
 8 a citizenship question to the 2020 decennial census, including that it would improve block-level
 9 data and would provide a direct measure of self-reported citizenship for the whole population.
 10 AR 1278.

11 89. The January 2018 Abowd Memo also reported that because the citizenship question
 12 was already asked on the ACS, the Census Bureau “would accept the cognitive research and
 13 questionnaire testing from the ACS instead of independently retesting the citizenship question.
 14 This means that the cost of preparing the new question would be minimal.” AR 1279; *see also*
 15 AR 415 (Census Bureau presentation on adding questions to the census, stating that “[i]f the
 16 question is not currently used in an ongoing survey, the Census Bureau must test the wording of
 17 the question”).

18 90. The January 2018 Abowd Memo also addressed the potential shortcomings of
 19 including a citizenship question on the census, including that there would likely be a decrease in the
 20 self-response rate, which would lead to higher nonresponse follow-up costs and fewer correct
 21 enumerations. AR 1280-82. The Memo estimated a potential 5.1% decrease in self-response
 22 among noncitizen households. AR 1280; *see also* AR 456. The Memo also concluded that the
 23 anticipated decrease in self-response would lead to lower quality citizenship data. AR 1280.

24 91. The Census Bureau’s conservative estimate that an additional 5.1% of households
 25 with at least one noncitizen may not self-respond to the 2020 census questionnaire if a citizenship
 26 question were included was based, in the absence of a randomized controlled experiment, on a
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1 natural experiment that could not definitively assign causation to the citizenship question itself.
 2 AR 1280.

3 92. The January 2018 Abowd Memo concluded that Option C, using administrative
 4 records for citizenship data, would yield more accurate results—because administrative records
 5 relating to citizenship are more accurate than self-reports—and would be less costly. AR 1283-
 6 1285; *see also* AR 284-310. *But see* AR 534-544. However, high-quality administrative records on
 7 citizenship do not cover the entire population. AR 1283-1285; *see also* AR 66-67, 108-09, 116, 660-
 8 62.

9 93. The January 2018 Abowd Memo recommended that the Secretary either make no
 10 change to the Census Bureau’s data collection on citizenship or obtain citizenship status from
 11 administrative records for the whole 2020 census population. AR 1277.

12 94. Following submission of the January 2018 Abowd Memo to Commerce leadership,
 13 Commerce prepared a list of 35 questions to the Census Bureau to obtain more details about and to
 14 probe the rationale underlying its analysis. AR 1286-1303, 8987. The questions represented a range
 15 of perspectives and concerns among the Secretary’s staff regarding the Census Bureau’s analysis
 16 and recommendations. *See* AR 1335, 1976-1978, 1980, 2043-44, 2046, 2472-2475, 2504-2505, 8678-
 17 8680. The final list of questions was delivered to the Census Bureau on January 30, 2018. AR
 18 1974, 12902-12904.

19 95. The Census Bureau provided answers to the questions through an iterative process,
 20 whereby Commerce received many drafts and partial responses before receiving the final response.
 21 *See, e.g.*, AR 1340-1352, 1599-1626, 1903-1963, 2316-2376, 5212-5215, 5583-5589, 7638-7645. The
 22 Census Bureau provided its final draft of the responses to Commerce on February 2, 2018. AR
 23 2292-2315, though some further revisions were made resulting in an updated final draft on
 24 February 6, 2018. AR 2954-2981, 3441-3459; *see, e.g.*, AR 2702-2711, 3142-3181, 6222-6232. The
 25 final version of the questions and answers included a revised answer to question 31, regarding the
 26 process that had been used in the past to add questions to the decennial census. AR 1286-1303,
 27 13023. The revised answer specified that, because no new questions had been added to the
 28

1 decennial census in recent years, past precedent relating to changes to the ACS did not govern the
 2 process for considering DOJ's request. AR 1296; *see* AR 13023.

3 96. Secretary Ross and his immediate staff reviewed Census's analyses. *See, e.g.*, 12479.

4 97. On February 12, 2018, Commerce and Census Bureau personnel, including
 5 Secretary Ross, met to discuss the Census Bureau's analysis to date. AR 9334-9335. At this
 6 meeting, the Secretary requested that the Census Bureau analyze a fourth alternative, Option D,
 7 which would combine Options B and C. AR 1309; AR 9433-9434.

8 98. The Census Bureau provided two memoranda analyzing Option D on February 23,
 9 2018, and March 1, 2018. AR 1304-1312, 2935-2940, 4713-4721; *see, e.g.*, AR 2180-2198, 4454-
 10 4462, 5613-22, 5945-5948, 5967-6155, 6159-6173. In addition, the Census Bureau continued to
 11 answer questions posed by Commerce until late March, 2018. *See, e.g.*, AR 2670-2680, 2894-2901,
 12 5577-5581, 5608-5610, 5798-5803, 9370, 9680-9721.

13 99. The Secretary reviewed over 50 incoming letters and emails from stakeholders,
 14 interest groups, Members of Congress, and state and local officials regarding reinstatement of a
 15 citizenship question on the 2020 decennial census. AR 1313; *see* AR 775-792, 794-1165, 1176-1193,
 16 1195-1197, 1210-1212, 1217-1220, 1222-1255, 1262-1273; *see also* AR 1768-1771, 3563-3565, 3915-
 17 3917. He also monitored views of the public more generally, as represented in media accounts. AR
 18 1313; *see* AR 666-733. In addition, he discussed the citizenship question with over 24 diverse, well-
 19 informed and interested parties, selected by his staff to represent a broad range of views. AR 1313;
 20 *see* AR 1194, 1198-1209, 1213-1216, 1221, 1256-1261, 1274-1276; *see also* AR 1638, 1798, 1807-08,
 21 1815-1816, 2599-2600, 2604, 3491, 8392-8467.

22 100. In considering all available information in determining whether to include a
 23 citizenship question, officials at the Department of Commerce recognized that citizenship is one of
 24 the core recommendations in the United Nations Principles and Recommendations for Population
 25 and Housing Censuses. AR 1319.

26 **D. The Secretary's Decision Memorandum**

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1 101. On March 26, 2018, Secretary of Commerce Wilbur Ross announced his decision to
2 reinstate a citizenship question on the 2020 decennial census. AR 1313-20.

3 102. In the decision memo, the Secretary stated that the decision was being made in
4 response to the December 12, 2017, DOJ letter, and that, after he had received the DOJ request, “I
5 set out to take a hard look at the request and ensure that I considered all facts and data relevant to
6 the question so that I could make an informed decision on how to respond. To that end, the
7 Department of Commerce (‘Department’) immediately initiated a comprehensive review process
8 led by the Census Bureau.” AR 1313.

9 103. The Secretary stated that this review included legal, program, and policy
10 considerations, and that he had met with Census Bureau leadership on multiple occasions to discuss
11 their review of the DOJ request and their recommendations. He also noted that he had received
12 and reviewed over fifty letters from stakeholders regarding the issue of reinstatement of a
13 citizenship question on the 2020 Census. AR 1313.

14 104. The Secretary first observed that the citizenship question had been a feature of
15 almost every decennial census for over a century, and had been included in some form on the “long
16 form” or ACS for decades, and was thus a well-tested question. AR 1314.

17 105. The Secretary stated that many stakeholders as well as the Census Bureau itself had
18 raised concerns that the reinstatement of a citizenship question would have a negative impact on
19 the response rate for non-citizens, but also noted that no one had produced evidence that the
20 response rate would decline “materially” as a result of the inclusion of a citizenship question. AR
21 1315.

22 106. The Secretary observed that although there was recent evidence that self-response
23 rates to the ACS were lower than in the 2010 decennial census, there were a number of potential
24 causes for this separate and apart from the citizenship question, including the outreach efforts
25 resulting in increased public awareness for the decennial census and the greater burden of
26 responding to the much longer ACS. AR 1315.

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1 107. Weighing the information that had been provided, the Secretary concluded that,
2 “while there is widespread belief among many parties that adding a citizenship question could
3 reduce response rates, the Census Bureau’s analysis did not provide definitive, empirical support for
4 that belief.” AR 1316.

5 108. The Secretary considered the alternative option of only using administrative records
6 to provide the citizenship data requested by DOJ, but noted that the Census Bureau “is still
7 evolving its use of administrative records, and the Bureau does not yet have a complete
8 administrative records data set for the entire population.” AR 1316. The Secretary noted that this
9 meant that a significant portion of the American voting age population could not be matched to
10 administrative records and, thus, would have to have citizenship information be imputed. AR 1316.

11 109. The Secretary concluded that a combination of using administrative records, the
12 development of which the Census Bureau could prioritize before the 2020 census, and reinstating a
13 citizenship question on the 2020 decennial census questionnaire was the best option to provide
14 DOJ the data it requested. AR 1317.

15 110. In making this determination, the Secretary explained that including the question on
16 the 2020 decennial census will give each person an option to provide an accurate answer, and
17 would only impose a minimal imposition of a single extra question which by law could only be used
18 anonymously and for statistical purposes. AR 1317.

19 111. The Secretary also noted that the use of administrative records in conjunction with
20 a question on the 2020 decennial census questionnaire would provide a method for obtaining
21 citizenship data for people who do not respond, as well as providing a check for accuracy for those
22 who respond with an inaccurate answer. AR 1317.

23 112. The Secretary noted that “I have carefully considered the argument that the
24 reinstatement of a citizenship question on the decennial census would depress response rate.”
25 AR 1317. However, the Secretary determined that the “need for accurate citizenship data”
26 outweighed such concerns, particularly in light of the lack of empirical evidence that the self-
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1 response rate would be materially impacted by the reinstatement of a citizenship question. AR
 2 1317.

3 113. The Secretary also considered the concern that reinstatement of a citizenship
 4 question would increase non-self-response rates by imposing an additional burden on those
 5 responding to the questionnaire. However, the Secretary noted that there was very limited
 6 empirical evidence that the inclusion of one additional question would have any material impact on
 7 self-response rates. AR 1318.

8 114. In addition, the Secretary considered whether the sensitivity of a question about
 9 citizenship could lead to a decrease in self-response rates. The Secretary noted that there was
 10 evidence from Nielsen studies, as well as past census initiatives, that the inclusion of such a
 11 sensitive question would not materially change the response rate. AR 1318.

12 115. The Secretary further considered the potential that the reinstatement of a
 13 citizenship question on the 2020 decennial census would lead to increased costs. The Secretary
 14 determined that it was difficult to assess whether, if the citizenship question led to lower initial self-
 15 response rates, it would lead to an increase in costs for NRFU efforts. The Secretary noted that the
 16 available evidence demonstrated that the impact on the cost of NRFU would likely be very small as
 17 the percent decrease in overall self-response estimated to be potentially caused by the citizenship
 18 question ($\frac{1}{2}\%$) was within the percent decrease (3%) accounted for in the Department's recent Life
 19 Cycle Cost Estimate for the 2020 census. AR 1319; *see* AR 173.

20 116. The Secretary noted not only that some form of citizenship question had been a
 21 part of census questionnaires for centuries, but also that censuses in many other major democratic
 22 nations, including Australia, Canada, France, Germany, Indonesia, Ireland, Mexico, Spain, and the
 23 United Kingdom, include a question asking about citizenship. AR 1319.

24 117. The Secretary ultimately concluded that, while it could not definitively be
 25 determined what the impact of a citizenship question would be on response rates, the value of
 26 having more complete and accurate citizenship data outweighed those concerns. AR 1319.

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1 118. The Secretary announced that “after a thorough review of the legal, program, and
 2 policy considerations, as well as numerous discussions with the Census Bureau leadership and
 3 interested stakeholders, I have determined that reinstatement of a citizenship question on the 2020
 4 decennial census is necessary to provide complete and accurate data in response to the DOJ
 5 request. To minimize any impact on decennial census response rates, I am directing the Census
 6 Bureau to place the citizenship question last on the decennial census form.” AR 1320.

7 119. The Census Bureau’s August 2018 analysis estimating a potential 5.8 percentage
 8 point decline in self-response from households containing a noncitizen (the “Brown Paper”) did
 9 not exist and was not considered or relied upon by the Secretary when he reached his decision to
 10 include a citizenship question on the 2020 questionnaire.

11 **IV. Extra-Record Evidence**

12 The merits of Plaintiffs’ APA and Enumeration Clause claims must be decided on the basis
 13 of the administrative record, without consideration of extra-record evidence produced in discovery
 14 or at trial. Accordingly, any facts derived from extra-record evidence cannot form the basis for this
 15 Court’s decision. However, because the Court allowed extra-record discovery based on a
 16 preliminary finding of pretext, facts demonstrating that the Secretary’s decision was not based on
 17 pretext are set forth below.

18 **A. Plaintiffs Have Failed to Show That the Secretary’s Decision Was a “Pretext”**

19 120. Plaintiffs failed to produce evidence sufficient to rebut the presumption of
 20 regularity.

21 121. Plaintiffs did not demonstrate that the Secretary did not believe the rationale set
 22 forth in his decision memorandum or that the Secretary’s initial policy preferences, whatever they
 23 may have been, render his ultimate decision arbitrary and capricious.

24 122. It is unremarkable for an agency head to enter office with predispositions toward
 25 certain policy choices. That the Secretary thought reinstatement of a citizenship question “could be
 26 warranted,” AR 1321, and asked his staff to explore such an action, is neither irregular nor evidence
 27 of improper decisionmaking.

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1 123. To the extent Plaintiffs rely on statements by officials other than the Secretary
 2 himself, such reliance is misplaced. That other officials might have supported the reinstatement of
 3 a citizenship question for different reasons does not indicate that the reasons given by the actual
 4 decisionmaker—the Secretary—were pretextual. And most of the officials’ statements generally
 5 regarding immigration, on which Plaintiffs rely, do not in any way concern the census or the
 6 citizenship question.

7 124. Even if relevant, no statements of other officials plausibly give rise to a cognizable
 8 inference of pretext here. For example, the Secretary’s communication with Kris Kobach, early in
 9 his tenure at the Department of Commerce, about the potential inclusion of a census question on
 10 both citizenship and lawful status does not by itself prove that the Secretary shared or was
 11 influenced by Mr. Kobach’s outreach—indeed, the Secretary rejected the latter’s proposed question.
 12 Without more, Plaintiffs’ reliance on this isolated, unsolicited communication as evidence of pretext
 13 is misplaced.

14 125. The Secretary’s congressional testimony also is insufficient to establish pretext. For
 15 example, the Secretary’s statement in his March 2018 memorandum that he “set out to take a hard
 16 look at the request” to “ensure that [he] considered all facts and data relevant to the question so
 17 that [he] could make an informed decision on how to respond,” AR 1313, does not necessarily
 18 imply either that he had not previously considered whether to reinstate a citizenship question, or
 19 that he had not had discussions with other agencies or government officials before he received
 20 DOJ’s formal request. Nor would it have made sense for the Secretary to take a “hard look” at
 21 DOJ’s request before receiving it.

22 126. The Secretary’s March 20 statement to Congress that he was ““responding solely to
 23 the Department of Justice’s request,”” Hr’g on FY 2019 Dep’t of Commerce Budget: Hearing
 24 Before the Subcomm. On Commerce, Justice, Sci. & Related Agencies of the H. Comm. on
 25 Appropriations, 115th Cong. 9 (2018), at 2018 WLNR 8815056, was in response to a question
 26 asking whether he was also responding to requests from third parties, *see id.*

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1 127. The Secretary's March 22 statement that DOJ "initiated the request for inclusion of
 2 the citizenship question," Hrg on Recent Trade Actions, Including Section 232 Determinations on
 3 Steel & Aluminum, Hrg Before the H. Ways & Means Comm., 115th Cong. 24 (2018), at 2018
 4 WLNR 8951469, was in response to a question about whether Commerce planned to include a
 5 citizenship question on the 2020 census, not a question about the Secretary's decision-making
 6 process. The statement was immediately followed by an acknowledgment that he had been
 7 communicating with "quite a lot of parties on both sides of [the] question" and that he "ha[d] not
 8 made a final decision, as yet" on this "very important and very complicated question," *id.*

9 **B. DOJ's Request for Citizenship Data Serves Legitimate VRA Enforcement
 10 Purposes**

11 128. After being contacted by the Secretary of Commerce, the Attorney General decided
 12 that DOJ would request that the Census Bureau reinstate a citizenship question on the census
 13 questionnaire.

14 129. John Gore, Acting Assistant Attorney General for the Civil Rights Division, drafted
 15 the letter requesting the reinstatement of the citizenship question.

16 130. "[C]itizenship data at the block level is necessary to bring Section 2 cases." Gore
 17 Dep. 33:2-8. Some courts have determined that CVAP data at the block level is necessary to
 18 determine if Hispanics meet the first prong of *Gingles* in Section 2 enforcement cases. AR 663.

19 131. "The Department of Justice is always trying to find the best possible data, whether
 20 it's from one source or multiple sources, to analyze jurisdictions for potential Section 2 violations
 21 and to bring appropriate Section 2 enforcement actions." Gore Dep. 25:1-14.

22 132. The Department of Justice investigates hundreds of Section 2 matters, and not all
 23 investigations result in the filing of a complaint in district court. Handley Trial Testimony (SDNY)
 24 853:9-15.

25 133. "[H]aving the most complete and accurate data regarding citizenship rates that the
 26 Census Bureau could provide would allow [DOJ] to fulfill its commitment to robustly enforcing the
 27 Voting Rights Act." Gore Dep. 26:8-13.

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1 134. It is the position of DOJ that the decennial census questionnaire is the most
 2 appropriate vehicle for collecting CVAP data for purposes of VRA enforcement, Gore Dep.
 3 169:22-170:5, although CVAP data collected through the census questionnaire is not necessary for
 4 DOJ's VRA enforcement efforts. Gore Dep. 300:5-11. However, Mr. Gore is not himself a
 5 statistician and has no experience drawing districts or using census block-group-level data to
 6 estimate block-level data. Gore Dep. 17:21-18:14, 167:14-19. The Census Bureau is therefore
 7 better situated than he is to determine the accuracy of various forms of CVAP data. Gore Dep.
 8 39:16-40:3. Plaintiffs' expert, Professor Pamela Karlan is also not herself a statistician and has no
 9 experience drawing districts or using census block-group-level data to estimate block-level data.
 10 Karlan Trial Dep. 70:19-22, 72:1-23.

11 135. Because of the limitations on the data contained in the ACS, analysts use estimation
 12 techniques on occasion to estimate block-level data for the purposes of the first *Gingles*
 13 precondition in section 2 Voting Rights Act cases. Karlan Trial Dep. 70:10-18.

14 136. The first *Gingles* precondition does not require a functional analysis; rather, it simply
 15 requires a bare majority of voting-age citizens. Handley Trial Testimony (SDNY) 851:1-11. The
 16 Gary letter focuses on the first *Gingles* precondition. *Id.* 851:10-12. The functional analysis that
 17 Plaintiffs' expert, Dr. Handley, has employed does not relate to the first of the *Gingles*
 18 preconditions. *Id.* 850:22-25.

19 137. Dr. Handley is aware that studies show that people do not answer the citizenship
 20 question accurately on the ACS, and that could affect her analysis under the first *Gingles*
 21 precondition. Handley Trial Testimony (SDNY) 841:20-842:5.

22 138. Dr. Handley is not an attorney and is not an employee of the Justice Department's
 23 Civil Rights Division. She therefore is not a decision-maker for DOJ. Handley Trial Testimony
 24 (SDNY) 853:16-20. She was not involved in drafting the Gary letter, and was not involved in
 25 DOJ's decision-making process concerning the letter. *Id.* 851:13-19.

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1 139. Dr. Handley is not offering an opinion in this case about the decision-making
2 process DOJ uses in deciding whether to bring a Section 2 case. Handley Trial Testimony (SDNY)
3 852:24-853:8.

4 140. DOJ's letter explained that using statistical methods to estimate block-level
5 citizenship data from block-group-level citizenship data results in uncertainty in the estimates. AR
6 665. The letter also explained that, unlike ACS citizenship data, citizenship data from the decennial
7 census would align in time with the total and voting-age population data from the census already
8 used in redistricting (called the P.L. 94-171 data). AR 665. Finally, the letter stated that census
9 citizenship data would allow the same data set to be used for redistricting, enforcing the Voting
10 Rights Act, and determining compliance with the Constitution's one-person, one-vote requirement.
11 AR 664.

12 141. The P.L. 94-171 data, providing population numbers by race, does not have the
13 kind of standard errors associated with an estimate based on a statistical sample. The P.L. 94-171
14 data file does not have sampling margins of error.

15 142. In contrast, the tabulation of CVAP data does contain sampling errors.

16 143. The Census Bureau has not made a decision on the way in which it will aggregate
17 the data to the block level for the CVAP table as a public use product, which would be available to
18 DOJ. Nor has the Census Bureau decided whether the block-level CVAP data will be included in
19 the P.L. 94-171 data file.

20 144. Although the Census Bureau's position is that administrative data would be the best
21 way to provide block-level CVAP data, it is still working to acquire additional data from certain
22 federal agencies to make this option more practicable.

23 145. The Census Bureau's use of disclosure avoidance procedures in reporting block-
24 level citizenship data from the 2020 census will not impair DOJ's intended use of that data to
25 assemble voting districts for Voting Rights Act purposes. The disclosure avoidance procedures,
26 which have been used since the 2000 census, necessarily affect the variability of the data. It is
27 therefore true that data for a particular census block may be obscured for confidentiality purposes.
28

1 However, for the 2020 census, the Census Bureau is using Department of Justice input—
 2 specifically, examples of cases in which DOJ has used demographic data in Voting Rights Act
 3 cases—to adjust the accuracy of the Census Bureau’s disclosure avoidance procedures so that when
 4 census blocks are combined to build voting districts, the resulting data will be fit for DOJ’s
 5 intended use.

6 **PROPOSED CONCLUSIONS OF LAW**

7 **I. Plaintiffs Have Failed to Prove Standing.**

8 **A. General Legal Standards for Article III Standing**

9 1. The doctrine of constitutional standing, an essential aspect of an Article III case or
 10 controversy, demands that a plaintiff have “a personal stake in the outcome of the controversy [so]
 11 as to warrant his invocation of federal-court jurisdiction.” *Warth v. Seldin*, 422 U.S. 490, 498 (1975)
 12 (internal citation omitted).

13 2. At its “irreducible constitutional minimum,” the doctrine requires a plaintiff, as the
 14 party invoking the Court’s jurisdiction, to establish three elements: (1) a concrete and particularized
 15 injury-in-fact, either actual or imminent; (2) a causal connection between the injury and defendants’
 16 challenged conduct, such that the injury is “fairly . . . trace[able] to the challenged action of the
 17 defendant”; and (3) a likelihood that the injury suffered will be redressed by a favorable decision.
 18 *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

19 3. The standing requirement of “injury in fact” requires proof that the plaintiff “has
 20 sustained or is immediately in danger of sustaining a direct injury” as a result of the challenged
 21 action. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1552 (2016) (citations omitted).

22 4. The injury must be “concrete and particularized,” *Defs. of Wildlife*, 504 U.S. at 560
 23 (citations omitted), and not “merely ‘conjectural’ or ‘hypothetical’ or otherwise speculative.”
 24 *Summers v. Earth Island Inst.*, 555 U.S. 488, 505 (2009) (quoting *Defs. of Wildlife*, 504 U.S. at 560).

25 5. Thus, an alleged future injury must be “certainly impending”; “[a]llegations of
 26 possible future injury’ are not sufficient.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013)
 27 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990), emphasis in *Clapper*).

1 6. The “fairly traceable” prong of standing requires Plaintiffs to prove that their
 2 certainly impending injuries “fairly can be traced to the challenged conduct of the defendant, and
 3 not injury that results from the independent action of some third party not before the court.” *Simon*
 4 *v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976).

5 7. In the census context, a mere showing of differential net undercount is not enough,
 6 as there has never been a perfect census count. *See Carey v. Klutznick*, 653 F.2d 732, 735 (2d Cir.
 7 1981). Plaintiffs instead must prove by a preponderance of the evidence that any differential net
 8 undercount (1) is specifically attributable to the citizenship question and (2) has an actual injurious
 9 effect on Plaintiffs.

10 8. As the parties invoking federal jurisdiction, Plaintiffs bear the burden of establishing
 11 these elements of standing “with the manner and degree of evidence required at the successive
 12 stages of the litigation.” *Def. of Wildlife*, 504 U.S. at 561. “And at the final stage, those facts (if
 13 controverted) must be ‘supported adequately by the evidence adduced at trial.’” *Id.* (quoting
 14 *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 115 n.31 (1979)).

15 9. If Plaintiffs cannot prove standing by a preponderance of the evidence, *Leite v. Crane*
 16 *Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014), the Court must refrain from addressing the merits of
 17 Plaintiffs’ APA and Enumeration and Apportionment Clause claims because “[f]ederal courts may
 18 not decide questions that cannot affect the rights of litigants in the case before them or give
 19 opinions advising what the law would be upon a hypothetical state of facts.” *Chafin v. Chafin*, 568
 20 U.S. 165, 172 (2013) (alterations and citations omitted).

21 10. Plaintiffs have not established, by a preponderance of the evidence, the three
 22 elements of Article III standing: Plaintiffs have not established a concrete and particularized injury-
 23 in-fact, that there is a fairly traceable causal connection between their alleged injury and the
 24 inclusion of the citizenship question, and a likelihood that the injury will be redressed by a favorable
 25 decision. *Def. of Wildlife*, 504 U.S. at 560.

26 **B. Plaintiffs Have Failed to Prove a Concrete, Non-Speculative Injury That Is
 27 Certainly Impending.**

28

1 **1. Plaintiffs Failed to Prove that They Face Any Imminent Risk of Concrete**
 2 **Injury in the Form of Lost Representation or Federal Funding.**

3 11. Plaintiffs' claims regarding a loss of representation or funding due to a net
 4 undercount resulting from the inclusion of a citizenship question are too speculative to satisfy
 5 Article III's requirements. *See Nat'l Law Ctr. on Homelessness & Poverty v. Kantor*, 91 F.3d 178, 185
 6 (D.C. Cir. 1996) (finding lack of standing where court could not determine "what effect any
 7 methodology for counting the homeless would have on the federal funding of any particular
 8 appellant," noting that "if a more accurate count would have enlarged some of the communities' shares, it likely would have reduced the shares of other communities"); *id.* at 186 ("interstate vote dilution injury is difficult to establish"); *Strunk v. U.S. Dep't of Commerce*, Civ. A. No. 09-1295, 2010 WL 960428, at *3 (D.D.C. Mar. 15, 2010) (rejecting vote dilution claim for lack of standing where plaintiff was "but one citizen of New York and one voter in New York's 11th Congressional District"); *Ridge v. Verity*, 715 F. Supp. 1308, 1318 (W.D. Pa. 1989) (finding no standing to bring an apportionment claim when "none of the plaintiffs in this case can show which states would gain and which states would lose representation in Congress"); *Fed'n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 570 (D.D.C. 1980) (holding that "none of the plaintiffs are able to allege that the weight of his or her vote in the next decade will be affected" where plaintiffs "can do no more than speculate as to which states might gain and which might lose representation" which depends, *inter alia*, on "the interplay of all other population factors which affect apportionment"); *see also Sharrow v. Brown*, 447 F.2d 94, 97 (2d Cir. 1971) (noting that plaintiff's claim of standing to challenge method of apportionment "presents difficulty" because plaintiff "would have to show, at least approximately, the apportionment his interpretation . . . would yield, not only for New York but for every other State as well").

23 12. Plaintiffs' asserted dilution of representation in the House of Representatives and in
 24 the Electoral College purportedly stemming from inclusion of the citizenship question is inherently
 25 speculative. Plaintiffs have not, and cannot, establish that the citizenship question will affect the
 26 share of Representatives to Congress allocated to the State of California. *See Franklin v. Massachusetts*, 505 U.S. 788 (1992) (because the plaintiffs had not "shown . . . that Massachusetts

1 would have an additional Representative if the allocation had been done using some other source of
 2 ‘more accurate’ data,” they “d[id] not have standing to challenge the accuracy of the data.” *Id.* at
 3 802 (plurality opinion)).

4 13. The process of apportionment itself makes any pre-census allegations as to the
 5 distribution of representatives (and, therefore, electors) speculative. Because the apportionment
 6 process is based on the population of every state, Plaintiffs cannot establish an imminent injury
 7 here because the 2020 census has not yet taken place and projections of state populations will
 8 continue to change between now and 2020. It is therefore impossible to “accurately measure” the
 9 population until the decennial census is taken in 2020. *See Fed’n for Am. Immigration Reform*, 486 F.
 10 Supp. at 570, 572 (holding “none of the plaintiffs are able to allege that the weight of his or her
 11 vote in the next decade will be affected” when plaintiffs “can do no more than speculate as to
 12 which states might gain and which might lose representation” depending on “the interplay of all the
 13 other population factors which affect apportionment”).

14 14. Plaintiffs also have not shown by a preponderance of the evidence that any
 15 potential differential undercount that may remain after NRFU operations and imputation will have
 16 an impact on federal funding. *Defs. of Wildlife*, 504 U.S. at 560

17 **2. Plaintiffs Failed to Prove They Have Been Required to Expend Additional
 18 Resources**

19 15. BAJI does not have standing to sue on its own behalf because it has not
 20 demonstrated it has suffered a “concrete and demonstrable injury to its activities—with a
 21 consequent drain on its resources—constitut[ing] … more than simply a setback to the
 22 organization’s abstract social interests.” *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982);
 23 *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010)
 24 (organization cannot simply “manufacture the injury by incurring litigation costs or simply choosing
 25 to spend money fixing a problem that otherwise would not affect the organization at all.”); *accord*
 26 *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 416 (2013) (plaintiff “cannot manufacture standing
 27 merely by inflicting harm on [itself] based on [its] fears of hypothetical future harm that is not
 28 certainly impending”); *Fair Housing of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002) (finding

1 standing because organization showed that “a drain on its resources from both a diversion of its
 2 resources and frustration of its mission”); *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423,
 3 1429–30 (D.C. Cir. 1996) (organization must show that its expenditure of resources was “a
 4 necessary link in achieving the organization’s ultimate purpose” and not just a product of
 5 “unnecessary alarmism constituting a self-inflicted injury”); *Fair Employment Council of Greater Wash.,*
 6 *Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1277 (D.C. Cir. 1994) (organization’s reallocation of
 7 resources not sufficient for standing when organization “and its programs would have been totally
 8 unaffected [by defendant’s conduct] if it had simply refrained from making the re-allocation”).

9 16. BAJI’s alleged expenditure of resources is not sufficient to establish Article III
 10 injury because it has not shown whether, absent any expenditure of resources it chooses to make,
 11 the inclusion of a citizenship question on the 2020 census would likely cause a differential net
 12 undercount. *La Asociacion de Trabajadores*, 624 F.3d at 1088; *see Clapper*, 133 S. Ct. at 1151 (Plaintiffs
 13 “cannot manufacture standing merely by inflicting harm on themselves based on their fears of
 14 hypothetical future harm that is not certainly impending.”). A plaintiff’s expenditure of resources is
 15 also insufficient to establish Article III standing unless it is “beyond those normally expended” in
 16 the absence of the challenged action. *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434
 17 (D.C. Cir. 1995); *accord Nat'l Law Ctr. on Homelessness & Poverty v. Kantor*, 91 F.3d 178, 182–83 (D.C.
 18 Cir. 1996) (organization’s expenditure of resources not sufficient to create standing because it was
 19 “part of its ordinary program expenditures”). BAJI has failed to show that it is expending any
 20 *additional* resources to counteract a sufficiently concrete, impending injury.

21 17. BAJI has not established standing because it has not shown a direct conflict
 22 between the defendant’s conduct and its mission. *Am. Soc'y for Prevention of Cruelty to Animals v. Feld*
 23 *Entertainment, Inc.*, 659 F.3d 13, 25 (D.C. Cir. 2011); *accord Nat'l Treasury Emps. Union*, 101 F.3d at
 24 1429–30 (“[I]n those cases where an organization alleges that a defendant’s conduct has made the
 25 organization’s activities more difficult, the presence of a direct conflict between the defendant’s
 26 conduct and the organization’s mission is necessary—though not alone sufficient—to establish
 27 standing.”).

28

1 18. When an organization's mission is to vindicate the rights of a particular group, there
 2 is no such "direct conflict" between that mission and an undercount of that group in the census
 3 because the undercount does not prevent the organization from continuing to pursue its mission of
 4 helping that group. *Nat'l Law Ctr. on Homelessness & Poverty v. Kantor*, 91 F.3d 178, 181–82 (D.C. Cir.
 5 1996).

6 19. The evidence demonstrates that BAJI lacks standing because it failed to
 7 demonstrate concrete and demonstrable injuries to its activities that could be directly attributed to
 8 the inclusion of a citizenship question on the 2020 decennial census.

9 20. The governmental plaintiffs' alleged expenditure of resources is also not sufficient
 10 to establish Article III injury because they have not shown whether, absent any expenditure of
 11 resources they choose to make, the inclusion of a citizenship question on the 2020 census would
 12 likely cause a differential net undercount. *La Asociacion de Trabajadores*, 624 F.3d at 1088; *see Clapper*,
 13 133 S. Ct. at 1151 (Plaintiffs "cannot manufacture standing merely by inflicting harm on themselves
 14 based on their fears of hypothetical future harm that is not certainly impending."). In addition, a
 15 plaintiff's expenditure of resources is insufficient to establish Article III standing unless it is
 16 "beyond those normally expended" in the absence of the challenged action. *Nat'l Taxpayers Union*,
 17 *Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995); *accord Nat'l Law Ctr. on Homelessness &*
 18 *Poverty v. Kantor*, 91 F.3d 178, 182–83 (D.C. Cir. 1996) (organization's expenditure of resources not
 19 sufficient to create standing because it was "part of its ordinary program expenditures"). The
 20 governmental plaintiffs have failed to show that they are expending any *additional* resources to
 21 counteract a sufficiently concrete, impending injury.

22 **3. Plaintiffs Failed to Prove That Any Lower Quality Demographic Data Will
 23 Perceptibly Impair Any Concrete and Cognizable Interest.**

24 21. Lower quality data in the abstract is insufficiently "concrete" and "tangible" to
 25 constitute an Article III injury in fact. *See Warth*, 422 U.S. at 508. Instead, Plaintiffs must show
 26 that that lower quality data will perceptibly impair some concrete and tangible cognizable interest.
 27 *See Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992) (plurality op.) (no standing for claim
 28 challenging use of inaccurate data in reapportionment because plaintiffs "have neither alleged nor

1 shown ... that Massachusetts would have had an additional Representative if the allocation had
 2 been done using some other source of ‘more accurate’ data”); *id.* at 823–29 (Scalia, J., concurring in
 3 judgment) (no standing for any claims); *Whitmore v. Arkansas*, 495 U.S. 149, 156–57 (1990) (death-
 4 row inmate lacked standing to challenge state’s incomplete and skewed database of other capital
 5 crimes against which his case could be compared because he failed to show that corrected database
 6 would lead state court to set aside his death sentence).

7 22. Plaintiffs failed to adduce evidence necessary to establish any tangible, cognizable
 8 harm based on alleged lower quality data resulting from the inclusion of a citizenship question on
 9 the 2020 decennial census.

10 **4. Plaintiffs Failed to Prove a Nonspeculative Risk of Loss of Confidentiality or
 11 Privacy**

12 23. Plaintiffs failed to establish that BAJI members’ sense of “fear and intimidation”
 13 based on concerns that their census responses will not be kept confidential rise to the level of
 14 injury-in-fact. Plaintiffs must demonstrate a substantial risk that BAJI members’ confidentiality or
 15 privacy is actually in danger—speculative worry does not satisfy Article III. *Clapper*, 133 S. Ct. at
 16 1151. Plaintiffs have not pointed to a single piece of evidence indicating that the Census Bureau
 17 will alter its longstanding and deeply held commitment to preserving the confidentiality of census
 18 responses, or make any other change that would lead to the disclosure of census responses.

19 **C. Plaintiffs Failed to Prove That Any Injury is Traceable to the Inclusion of the
 20 Citizenship Question or that Any Alleged Injury Could be Redressed.**

21 24. To ensure that a plaintiff’s allegations of harm are fairly attributable to the
 22 challenged action, it is necessary to allege “a causal connection between the injury and conduct
 23 complained of so that the injury is fairly traceable to the challenged action of the defendant and not
 24 the result of the independent action of some third party who is not before the court.” *Defs. of
 25 Wildlife*, 504 U.S. at 560; *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (“[A] federal court
 26 [must] act only to redress injury that fairly can be traced to the challenged conduct of the
 27 defendant, and not injury from independent action of some third party not before the court.”); *see*

1 *also Warth*, 422 U.S. at 504 (finding standing lacking where alleged injury resulted from outside
 2 forces, “rather than . . . respondents’ assertedly illegal acts”).

3 25. The evidence demonstrates that Plaintiffs cannot meet their burden of establishing
 4 that any differential undercount remaining after NRFU operations is traceable specifically to the
 5 citizenship question rather than to the general macro-environment and political climate. Plaintiffs’
 6 own experts testified about challenges facing the census in the current macro-environment, and
 7 Plaintiffs will be unable to untether any incremental impact on census participation from those pre-
 8 existing factors.

9 26. Because Plaintiffs cannot decouple any impact on census participation due to the
 10 purported impact of the citizenship question from other, pre-existing factors, it follows they cannot
 11 demonstrate that their alleged injuries would be redressed by the removal of the citizenship
 12 question. *Defs. of Wildlife*, 504 U.S. at, 560.

13 **II. Plaintiffs Failed to Prove that the Secretary’s Decision to Reinstate a Citizenship**
 14 **Question was Arbitrary and Capricious.**

15 **A. Legal Standards for Review Under the Administrative Procedure Act**

16 27. Under the APA, a court is not authorized to set aside agency action as arbitrary and
 17 capricious if the agency’s decision “was the product of reasoned decisionmaking.” *Motor Vehicle*
Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co. (“State Farm”), 463 U.S. 29, 52 (1983). “This
 18 standard of review is highly deferential, presuming the agency action to be valid and affirming the
 19 agency action if a reasonable basis exists for its decision.” *Pacific Dawn LLC v. Pritzker*, 831 F.3d
 20 1166, 1173 (9th Cir. 2016) (citation omitted).

21 28. An agency decision will only be set aside if it “has relied on factors which Congress
 22 had not intended it to consider, entirely failed to consider an important aspect of the problem,
 23 offered an explanation for its decision that runs counter to the evidence before the agency, or is so
 24 implausible that it could not be ascribed to a difference in view or the product of agency expertise.”
Managed Pharmacy Care v. Sebelius, 716 F.3d 1235, 1244 (9th Cir. 2013) (citation omitted).

25 29. The Court’s role is limited to determining whether the agency has “examine[d] the
 26 relevant data and articulate[d] a satisfactory explanation for its action including a rational
 27

1 connection between the facts found and the choice made.” *State Farm*, 463 U.S. at 43. And “[t]hat
 2 requirement is satisfied when the agency’s explanation is clear enough that its ‘path may reasonably
 3 be discerned.’” *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (citation omitted).

4 30. The Court’s review in this case must be particularly deferential because Plaintiffs
 5 challenge the Secretary’s broad discretion over the census. “The text of the Constitution vests
 6 Congress with virtually unlimited discretion in conducting the decennial ‘actual Enumeration,’” and
 7 “there is no basis for thinking that Congress’ discretion is more limited than the text of the
 8 Constitution provides.” *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996) (quoting art. 1, § 2, cl. 3)
 9 (emphasis added).

10 31. Congress, in turn, “has delegated its broad authority over the census to the
 11 Secretary.” *Wisconsin*, 517 U.S. at 19 (citing 13 U.S.C. § 141(a)). Thus, “[t]he wide discretion
 12 bestowed by the Constitution upon Congress, and by Congress upon the Secretary’ demands a high
 13 degree of ‘judicial deference’ to the Secretary’s decisions concerning the conduct of the census.”
 14 *New York v. U.S. Dep’t of Commerce*, 315 F. Supp. 3d 766, 799 (S.D.N.Y. 2018) (quoting *Wisconsin*,
 15 517 U.S. at 22-23).

16 32. Plaintiffs’ arbitrary-and-capricious claim should be resolved as a matter of law based
 17 on an evaluation of the record before the agency decisionmaker. Where, as here, “a party seeks
 18 review of agency action under the APA ..., the district judge sits as an appellate tribunal,” and
 19 “[t]he entire case on review is a question of law.” *Herguan Univ. v. ICE*, 258 F. Supp. 3d 1050, 1063
 20 (N.D. Cal. 2017) (quoting *Rempfer v. Sharfstein*, 583 F.3d 860, 865 (D.C. Cir. 2009)).

21 33. Any testimony introduced by Plaintiffs at trial should not properly be considered on
 22 APA review because such evidence was not before the Secretary and thus is irrelevant to his
 23 decision. Considering expert testimony after the fact is inconsistent with the APA standard of
 24 review and the required deference to the agency’s factfinding. *See, e.g., Vt. Yankee Nuclear Power*
 25 *Corp. v. Nat. Resources Def. Council, Inc.*, 435 U.S. 519, 549 (1978); *Walter O. Boswell Mem’l Hosp. v.*
 26 *Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984).

27

28

1 34. Similarly, materials produced in discovery are not, as a general matter, properly
 2 considered in a review of agency action under the APA because those materials are not considered
 3 part of the “whole record” before the agency. 5 U.S.C. § 706; *see e.g.*, *Camp v. Pitts*, 411 U.S. 138,
 4 142 (1973) (per curiam); *Animal Defense Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988)
 5 (discussing exceptions).

6 35. The Administrative Record contains all relevant information pertaining to Secretary
 7 Ross’s decision.

8 36. Under Title 13, Secretary Ross has virtually unlimited discretion to consider and
 9 weigh evidence in the record to make policy decisions regarding the census, including such
 10 decisions made in response to agency requests.

11 **B. The Secretary’s Decision to Reinstate a Citizenship Question on the 2020
 12 Decennial Census was Reasonable.**

13 37. The administrative record demonstrates that the Secretary of Commerce’s decision
 14 to reinstate a citizenship question on the 2020 decennial census was reasonable and fully consistent
 15 with the APA. *See* AR 1-13,024.

16 38. The Secretary’s decision is reasonable because his memorandum reflects that he
 17 conducted “a thorough review of the legal, program, and policy considerations, as well as numerous
 18 discussions with the Bureau leadership and interested stakeholders.” *See, e.g.*, AR 1320.

19 39. The Secretary’s decision is reasonable, and specifically his Decision Memorandum
 20 does not run counter to the evidence, because the memorandum reflects that he determined that
 21 adding the citizenship question “is necessary to provide complete and accurate data in response to
 22 the DOJ request.” AR 1320.

23 40. The Secretary’s decision is reasonable because he considered and accounted for the
 24 effect of a citizenship question on census response rates and correctly noted in his decision the lack
 25 of evidence that response rates would decline materially because of the question, and because the
 26 Secretary expressly addressed how the Bureau’s budget provided sufficient funding for NRFU
 27 efforts to prevent an undercount. AR 1315-1319.

28

1 41. The Secretary's decision is reasonable because he explicitly recognized that both
2 stakeholders and the Census Bureau had raised concerns that the inclusion of a citizenship question
3 on the census could have a negative impact on self-response rates for non-citizens, but correctly
4 noted that no one had produced evidence that the response rate would decline materially as a result
5 of the inclusion of a question that had previously been on the census for decades. AR 1315.

6 42. The Secretary's decision is reasonable because, as he explained in his Decision
7 Memorandum, asking a citizenship question in conjunction with using administrative records allows
8 the Bureau to compare the responses to the records to establish the most accurate, usable, and
9 complete citizenship data and could reduce the Bureau's burden of imputing missing citizenship
10 data. AR 1317.

11 43. The Secretary's decision is reasonable because he considered alternative options,
12 such as the use of administrative records only, but concluded that the Census Bureau "is still
13 evolving its use of administrative records, and the Bureau does not yet have a complete
14 administrative records data set for the entire population." AR 1316.

15 44. The Secretary's decision is reasonable because he carefully considered the possibility
16 of depressed self-response rates before making the reasonable determination that "the need for
17 accurate citizenship data and the limited burden that the inclusion of the citizenship question would
18 impose outweigh fears about a potentially lower response rate." AR 1317.

19 45. The Secretary acknowledged the macro-environment and that there may be a
20 distrust of government, and recognized that this distrust would exist regardless of a citizenship
21 question. AR 1317. The Secretary correctly noted that no one could provide an analysis showing a
22 material decline in self-response rates among those who generally distrusted the government. *Id.*

23 46. The Secretary's decision to add the citizenship question is reasonable because the
24 Secretary expressly addressed how the Bureau's budget provided sufficient funding for NRFU
25 efforts to prevent an undercount, and because "[t]he citizenship data provided to DOJ will be more
26 accurate with the question than without it, which is of greater importance than any adverse effect
27 that may result from people violating their legal duty to respond." AR 1319.

28

1 47. The Secretary's decision is reasonable because he weighed the evidence, including
 2 the possible cost and quality implications of reinstating a citizenship question, and concluded that a
 3 combination of using administrative records and reinstating a citizenship question on the 2020
 4 decennial census, was the best option to provide DOJ the data it requested. AR 1317.

5 48. Secretary Ross's decision was not pretextual because no evidence suggests that
 6 Secretary Ross did not believe the stated rationale in his Decision Memorandum. *See Jagers v. Fed.*
 7 *Crop Ins. Corp.*, 758 F.3d 1179, 1186 (10th Cir. 2014).

8 49. The Secretary's decision to add the citizenship question was not contrary to law
 9 because his Decision Memorandum responds to a new circumstance—DOJ's request to the Bureau
 10 for block-level CVAP data to enforce the Voting Rights Act—and reflects the Secretary's
 11 understanding of the value of such data, and because the Secretary made an explicit determination
 12 based on the information provided by the Census Bureau that using administrative records alone
 13 would be inadequate for a significant portion of the population.

14 50. Secretary Ross's decision to add the citizenship question was not contrary to law
 15 because the Bureau's internal data collection standards do not require pretesting for questions that
 16 perform adequately in another survey, and the Bureau's senior executive staff determined and
 17 informed Secretary Ross that the question was adequately tested, given the thorough testing of the
 18 citizenship question on the American Community Survey and the logistical constraints that
 19 prevented further pretesting.

20 **III. The Secretary's Decision to Reinstate a Citizenship Question Was in Accordance**
 21 **With Law.**

22 **A. The Secretary's Decision Fully Complies with 13 U.S.C. § 6(c).**

23 51. There is a statutory requirement that, "[t]o the maximum extent possible and
 24 consistent with the kind, timeliness, quality and scope of the statistics required, the Secretary shall
 25 acquire and use information available from any source referred to in subsection (a) or (b) of this
 26 section instead of conducting direct inquiries." 13 U.S.C. § 6(c).

27
 28

1 52. DOJ specifically requested that a citizenship question be included on the 2020
 2 decennial census to gather census-block level data to facilitate its enforcement efforts under Section
 3 of the Voting Rights Act (VRA). AR 663-64.

4 53. The Secretary made an explicit determination that using administrative records
 5 alone would be inadequate for a significant portion of the population, and that the information that
 6 could be gained from administrative records alone was not of “the kind, timeliness, quality and
 7 scope of the statistics required” for DOJ’s VRA enforcement efforts. *See* AR 1316. Therefore, 13
 8 U.S.C. § 6(c) does not prohibit the Secretary from including a citizenship question on the 2020
 9 decennial census in addition to the use of administrative records.

10 **B. The Secretary’s Decision Was in Accordance with 13 U.S.C. § 141(f).**

11 **1. The Court Lacks Jurisdiction to Review Plaintiffs’ Claim that Secretary Ross
 12 Violated the Reporting Requirement of § 141(f)(3).**

13 54. Plaintiffs’ assertion that the Secretary violated Section 141(f) of the Census Act
 14 because he did not identify “citizenship” as a subject for the 2020 census in his March 2017 report
 15 to Congress, and “there are no ‘new circumstances . . . which necessitate’ the inclusion of the
 16 citizenship question on the census” must be rejected as a matter of law.

17 55. Congressional reporting requirements—like § 141(f)—are beyond the courts’
 18 jurisdiction to review for two reasons: (1) the courts cannot redress any injury resulting from an
 19 inadequate report because it is Congress’s sole decision how to respond to a report, adequate or
 20 inadequate; and (2) submitting an informational report to Congress is not the type of “final agency
 21 action” covered by APA review because it does not determine rights or obligations or trigger legal
 22 consequences. 5 U.S.C. §§ 551 (13), 701(a); *Guerrero v. Clinton*, 157 F.3d 1190, 1191-92, 1196 (9th
 23 Cir. 1998) (“[T]his issue seems to us quintessentially within the province of the political branches to
 24 resolve as part of their ongoing relationships.” (quoting *Nat. Resources Def. Council, Inc. v. Hodel*, 865
 25 F.2d 288, 318-19 (D.C. Cir. 1988)); *see also, e.g.*, *Renee v. Duncan*, 686 F.3d 1002, 1016-17 (9th Cir.
 26 2012) (explaining that the courts could not redress an injury based on an alleged violation of a
 27 requirement “to file an annual report to Congress”); *Wilderness Soc’y v. Norton*, 434 F.3d 584, 591
 28 (D.C. Cir. 2006) (declining to review agency’s required submission of recommendations to the

1 President, because “[t]here is no good reason to believe that such an order will redress [plaintiffs’]
2 injuries. No legal consequences flow from the recommendations”); *Taylor Bay Protective Ass’n v.*
3 *Adm’r, EPA*, 884 F.2d 1073, 1080-81 (8th Cir. 1989) (declining to review agency compliance with a
4 congressional reporting provision because “nothing in the scheme indicat[es] that judicial review . . .
5 is necessary or advisable. . . . Additionally, the nature of the agency action here is distinct from the
6 type of agency action normally reviewable”); *United States v. White*, 869 F.2d 822, 829 (5th Cir. 1989)
7 (declining to review an agency’s compliance with a congressional reporting requirement because
8 “[t]his court will not scrutinize the merits or timeliness of reports intended solely for the benefit of
9 Congress”); *Natural Resources Def. Council, Inc. v. Hodel*, 865 F.2d 288, 318-19 (D.C. Cir. 1988)
10 (declining to review an agency’s allegedly insufficient report under a congressional reporting
11 provision because managing the reports should be left to Congress, and the Court “despair[ed] at
12 formulating judicially manageable standards” to evaluate the reports on Congress’s behalf); *Coll.*
13 *Sports Council v. Gov’t Accountability Office*, 421 F. Supp. 2d 59, 68 (D.D.C. 2006) (holding that
14 plaintiffs could not bring an APA claim to challenge an agency’s misstatements to Congress under a
15 reporting statute because “[w]here a report is not explicitly or implicitly intended as anything more
16 than a vehicle to inform Congress, it is for Congress alone to determine if the Report satisfies the
17 statutory requirements it enacted” (internal quotation marks and citation omitted)).

2. Secretary Ross's Submission of § 141(f) Reports Was Entirely Proper

19 56. Even if this claim were reviewable, Section 141(f) has been fully satisfied. Pursuant
20 to 13 U.S.C. § 141(f)(2), the intended questions for the 2020 decennial census have been submitted
21 to Congress. *See* Questions Planned for the 2020 Census and American Community Survey (Mar.
22 29, 2018), <https://www2.census.gov/library/publications/decennial/2020/operations/planned-questions-2020-acs.pdf>. Through that report, Secretary Ross informed Congress of the questions
23 for the 2020 decennial census, including the citizenship question, *id.* at 7, thus satisfying the
24 requirements of § 141(f)(3), if a 141(f)(3) report were required. There is no requirement that the
25 Secretary inform Congress of the new circumstances triggering modifications to subjects submitted
26 under (f)(1). 13 U.S.C. § 141(f)(3).

1 57. In any event, Secretary Ross could remedy any error by simply submitting a
 2 §141(f)(3) report at any time between now and the 2020 census. *See* 13 U.S.C. § 141(f)(3)
 3 (permitting submission of such a report at any time after the submission of a § 141(f)(1) or (2)
 4 report and “before the appropriate census date”). Accordingly, if a §141(f)(3) report is required,
 5 the Secretary has fully satisfied the Census Act, or could do so any time before April 1, 2020.

6 **IV. Plaintiffs Have Failed To Show That the Secretary’s Decision Was a “Pretext”**

7 58. “The presumption of regularity supports the official acts of public officers and, in
 8 the absence of clear evidence to the contrary, courts presume that they have properly discharged
 9 their official duties.” *Nat'l Archives & Records Admin. v. Fawish*, 541 U.S. 157, 174 (2004); *J. Andrew
 10 Lange, Inc. v. FAA*, 208 F.3d 389, 394 n.7 (2d Cir. 2000) (“Absent a showing to the contrary, it is
 11 presumed the agency considered all evidence in the record when making its determination.”).

12 59. As the Supreme Court repeatedly has explained, where there is a “contemporaneous
 13 explanation” for an agency’s decision, its validity “must . . . stand or fall on the propriety of that
 14 finding.” *Camp*, 411 U.S. at 143. Because the Court should be applying “the appropriate APA
 15 standard of review to the agency decision based on the record the agency presents to the reviewing
 16 court,” *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729 743-44 (1985) (internal citation omitted),
 17 Plaintiffs may not rely on material outside the properly designated administrative record to argue
 18 that an agency acted arbitrarily and capriciously any more than an agency can rely on post-hoc
 19 rationalizations to defend the rationality of its actions. *See SEC v. Chereny Corp.*, 318 U.S. 80, 94
 20 (1943).

21 60. Even if the Secretary had additional reasons for reinstating a citizenship question or
 22 expressed interest in adding a question before hearing from DOJ, the analysis under the APA
 23 would remain unchanged. *See Jagers v. Fed. Crop Ins. Corp.*, 758 F.3d 1179, 1186 (10th Cir. 2014)
 24 (rejecting argument that “the agency’s subjective desire to reach a particular result must necessarily
 25 invalidate the result, regardless of the objective evidence supporting the agency’s conclusion”).

26 61. Plaintiffs have failed to prove that the Secretary did not actually believe the
 27 rationale set forth in his decision memorandum or that he acted with an unalterably closed mind.
 28

1 Nor can they show that the Secretary’s initial policy preferences, whatever they may have been,
 2 render his ultimate decision arbitrary and capricious. *See Jagers v. Fed. Crop Ins. Corp.*, 758 F.3d 1179,
 3 1186 (10th Cir. 2014) (rejecting argument that “the agency’s subjective desire to reach a particular
 4 result must necessarily invalidate the result, regardless of the objective evidence supporting the
 5 agency’s conclusion”). As Justice Gorsuch has explained, “there’s nothing unusual about a new
 6 cabinet secretary coming to office inclined to favor a different policy direction, soliciting support
 7 from other agencies to bolster his views, disagreeing with staff, or cutting through red tape.” *In re*
 8 *Dep’t of Commerce*, __ S. Ct. __, 2018 WL 5259090, at *1 (Oct. 22, 2018) (Gorsuch, J., concurring in
 9 part and dissenting in part).

10 **V. Plaintiffs’ Enumeration Clause Claim Must Be Rejected**

11 62. Plaintiffs’ Enumeration Clause claims must be decided on the basis of the
 12 administrative record, without consideration of extra-record evidence produced in discovery or at
 13 trial, because the APA provides the waiver of sovereign immunity for this claim and its structures on
 14 judicial review apply with equal force. *Jarita Mesa Livestock Grazing Ass’n v. U.S. Forest Serv.*, 58 F.
 15 Supp. 3d 1191, 1237 (D.N.M. 2014) (that the case “alleges constitutional violations as well as
 16 statutory ones does not take it outside of the APA”).

17 63. Plaintiffs cannot show that the inclusion of a citizenship question will prevent the
 18 accomplishment of an actual enumeration of the population. *Wisconsin v. City of New York*, 517 U.S.
 19 1, 20 (1996)

20 64. Plaintiffs have not shown that the inclusion of a citizenship question undermines
 21 the strong constitutional interest in the accuracy of the census. *Utah v. Evans*, 536 U.S. 452, 478
 22 (2002).

23 65. The possibility of an undercount exists in every census and the Constitution does
 24 not require perfection, *Utah v. Evans*, 536 U.S. at 504 (Thomas, J., concurring in part and dissenting
 25 in part); *Wisconsin v. City of New York*, 517 U.S. at 6 (recognizing that no census has been wholly
 26 successful in achieving goal of complete enumeration).

27 **VI. Any Relief Granted to Plaintiffs Must Comport with the APA and Art. III’s**
 28 **Limitations**

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A. Remand to the Agency Is the Only Potentially Appropriate Remedy

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66. This Court should uphold the Secretary's decision to include a citizenship question and enter judgment in Defendants' favor.

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67. If the Court were to conclude that the Secretary's decision is not supported by the administrative record or is otherwise unlawful, the appropriate remedy would be to remand to the agency for further consideration. 5 U.S.C. § 706(2); *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 151 (D.C. Cir. 1993) (holding that remand without vacatur was appropriate when "the consequences of vacating may be quite disruptive" and "the possibility that the [agency] may be able to justify" the decision on remand); *California Communities Against Toxics v. EPA*, 688 F.3d 989, 992 -94 (9th Cir. 2012)(recognizing that a flawed rule need not be vacated and can be left in place while the agency follows the necessary procedures to correct its action); *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir.1995) (holding that although "ordinarily" regulations that are not promulgated in compliance with the APA are invalid, "when equity demands, the regulation can be left in place while the agency follows the necessary procedures."); *Nat. Res. Def. Council v. U.S. Envt'l Prot. Agency*, 676 F. Supp. 2d 307, 312 (S.D.N.Y. 2009) ("Where an agency action is remanded for further proceedings, the determination of whether or not also to vacate the agency action is left to the court's discretion.") (citing *Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 98 (D.C. Cir. 2002)).

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68. A remand to the agency without vacatur is appropriate here because the agency could correct any procedural deficiencies on remand, and vacatur would be extremely disruptive to the agency. *Allied-Signal*, 988 F.2d at 151; *AquAlliance v. Bureau of Reclamation*, 312 F. Supp. 3d 878, 881 (E.D. Cal. 2018)(stating that in "determining whether to vacate an agency decision, courts in the Ninth Circuit look to the factors described in *Allied-Signal*").

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69. Courts have repeatedly emphasized that remand without vacatur is appropriate even if there is only "a non-trivial likelihood" that the [agency] will be able to state a valid legal basis for its rules," *In re Core Comm'n, Inc.*, 531 F.3d 849, 861 (D.C. Cir. 2008) (quotation omitted), or a

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1 “significant possibility” that the agency may be able to explain itself on remand. *Williston Basin*
 2 *Interstate Pipeline Co v. FERC*, 519 F.3d 497, 504 (D.C. Cir. 2008).

3 70. Should the Court determine that the decision should be remanded, Plaintiffs’
 4 request that this Court enjoin Secretary Ross and his staff at the Department of Commerce from
 5 participating in the decision on remand must be rejected as beyond the scope of relief contemplated
 6 by the APA and unjustified by the record in this case.

7 **B. Any Relief Granted in this Case Should Not Extend Beyond the Plaintiffs That**
 8 **Demonstrate an Injury-in-Fact Traceable to Defendants**

9 71. Any request by Plaintiffs for an injunction that would extend beyond the Plaintiffs
 10 in this litigation must be rejected. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (to establish
 11 Article III standing, a plaintiff “must allege personal injury fairly traceable to the defendant’s
 12 allegedly unlawful conduct and likely to be redressed by the requested relief.”); *Town of Chester v.*
 13 *Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (“[S]tanding is not dispensed in gross,” and the
 14 plaintiff must establish standing “separately for each form of relief sought.”); *see also Warth v. Seldin*,
 15 422 U.S. 490, 499 (1975) (“The Art. III judicial power exists only to redress or otherwise to protect
 16 against injury to the complaining party, even though the court’s judgment may benefit others
 17 collaterally.”).

18 72. Article III requires this Court to reject any relief to Plaintiffs that extends beyond
 19 the injuries they have proven they have sustained and that are directly attributable to the
 20 Defendants’ conduct. *See Gill v. Whitford*, 138 S. Ct. 1916, 1930-31 (holding in case challenging
 21 alleged gerrymandering, that “the remedy that is proper and sufficient lies in the revision of the
 22 boundaries of the individual’s own district,” not the broader remedy of “restructuring all of the
 23 State’s legislative districts.”) *Id.* at 1934 (cautioning that, on remand, “standing is not dispensed in
 24 gross”: A plaintiff’s remedy must be tailored to redress the plaintiff’s particular injury.” *Id.* at 1934
 25 (quoting *Cuno*, 547 U.S. at 353).

26 73. Any conclusion of law deemed to be a finding of fact is incorporated into the
 27 findings of fact.

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2 Respectfully submitted,
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6 Dated: December 28, 2018
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